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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 883

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J. S. BUTNAM AND STANLEY M. BURNS, EXECUTORS OF THE ESTATE OF ABRAHAM BURTMAN,

*Petitioners,*

*vs.*

STATE OF NEW HAMPSHIRE

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Executors of the Estate of Abraham Burtman respectfully petition for a writ of certiorari to the Supreme Court of New Hampshire to review the orders of said Court, entered on February 1, 1949 (R. 18) and March 23, 1949 (R. 34) dismissing the petition of the Executors filed in the Probate Court of Strafford County.

The opinion of the Supreme Court of New Hampshire (R. 18) is reported at 63 Atlantic 2d 798.

A

**Statement of the Matters Involved**

Abraham Burtman, a resident of Farmington, N. H., died on March 26, 1946. His will was duly approved and allowed in Strafford County Probate Court on April 2, 1946. The petitioners, J. S. Butman and Stanley M. Burns, are the surviving executors of his will.

Abraham Burtman left his wife, Avelyn Frey Burtman, the sum of Fifty Thousand Dollars ($50,000) by clause 2 of his will. She had agreed in an antenuptial agreement dated February 23, 1945, that she would accept that amount in full payment and satisfaction of her widow's distributive share should she survive Abraham Burtman. However, on or about July 1, 1946, Avelyn Frey Burtman filed a waiver of the provisions of the will of Abraham Burtman and claimed a widow's distributive share of the estate under the laws of the State of New Hampshire. On that date she also appealed from an order of the Probate Court granting a license to the executors to sell shares of the H. O. Rondeau Shoe Co., which formed part of the estate.

Extended negotiations were carried on between the parties and their respective attorneys. A compromise agreement was finally reached under the terms of which the executors paid Avelyn Frey Burtman the sum of One Hundred Thousand Dollars ($100,000) from the assets of the estate in addition to her legacy of Fifty Thousand Dollars ($50,000). She also received certain other property from other sources in the settlement. *Burtman* v. *Butman,* 94 N. H. 412. There were disputed questions of law and of fact involved in the claim of Avelyn Frey Burtman against the estate. In view of the disputed issues the settlement made by the executors was reasonable and beneficial to the estate and was so found by the Probate Court.

The residue of the estate of Abraham Burtman was left in trust for charitable purposes under article 26 of the will. Before reduction due to the compromise agreement the residue amounted to $622,617.98, upon which the Legacy and Succession Tax Department of New Hampshire assessed a tax under R. L., c. 87 of $52,922.52. The amount which would come to this residuary trust was reduced by One Hundred Thousand Dollars ($100,000) by reason of the payment made by the executors to Avelyn Frey Burtman. The Legacy and Succession Tax Department of New Hampshire levied an inheritance tax on this One Hundred Thousand Dollars ($100,000) by including it in the taxable estate of Abraham Burtman. Of the amount received by the widow, the Legacy and Succession Tax Department exempted only the Fifty Thousand Dollars ($50,000) bequeathed to her by the will. The executors contended that no tax should be assessed upon the One Hundred Thousand Dollar ($100,000) payment. The tax fell on the trustees of the charitable trust who were thereby ordered to pay an inheritance tax upon a legacy of One Hundred Thousand Dollars ($100,000) which they did not receive.

The executors brought a petition in the Strafford County Probate Court appealing from the assessment of the legacy and succession tax on the estate of Abraham Burtman by the Legacy and Succession Tax Department of the State of New Hampshire. An answer was filed by the Assistant Attorney General of the State of New Hampshire, appearing for the Legacy and Succession Tax Department. On a reserved case the following question of law was certified to the Supreme Court of the State of New Hampshire, under the provisions of c. 90, Laws of 1947 of the State of New Hampshire:

> "Under the foregoing facts, is the Legacy and Succession Tax Department of the State of New Hamp-

shire correct in exempting only the sum of Fifty Thousand Dollars ($50,000), the amount of the legacy payable to the widow by Clause 2 of the will, or should it exempt in addition the sum of One Hundred Thousand Dollars ($100,000) which the widow received under the terms of the compromise?'' (Record p. 5).

The Supreme Court of the State of New Hampshire dismissed the petition by a divided decision, with Chief Justice Branch dissenting. A motion for rehearing was filed by the executors and was denied.

B

**Jurisdiction**

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended; 28 U. S. C. 344(b). The petitioners contend that the Inheritance Tax Law of the State of New Hampshire (R. L., c. 87, s. 1), as construed by a majority of the New Hampshire Supreme Court is unconstitutional, since a violation of the Fourteenth Amendment of the United States Constitution. The Inheritance Tax Law subjects to a tax

> ''All property within the jurisdiction of the State . . . belonging to domiciliaries of the State . . . which shall pass by will, or by the laws regulating intestate succession . . . to any person . . . except . . . the . . . wife.''
>
> R. L., c. 87, s. 1, as amended by Laws of 1945, c. 3, s. 1 and c. 144, s. 1.

The order of the Supreme Court of New Hampshire dismissing the petition was entered on February 1, 1949. On February 10, 1949, the executors moved for an extension of time in which to file a motion and brief for rehearing. On February 14, the motion of the executors for an extension of time was granted and the time was extended until Febru-

ary 22, 1949. On February 21, 1949, the petition for rehearing and brief in support thereof were filed. The petition for rehearing was thereafter considered and was denied by the Court on March 23, 1949.

The order of the Supreme Court of New Hampshire dismissing the petition did not become a judgment until after the petition for rehearing was denied. The applicable New Hampshire statute provides that the certificate of the Supreme Court of New Hampshire shall not be filed with the Court below until thirty days after the order made in the Supreme Court of New Hampshire. R. L., c. 369, s. 14. A certificate was not delivered from the Supreme Court to the Probate Court until the disposition of the motion for rehearing. This appeal is brought within ninety days of the disposition of the motion for rehearing.

C

**Constitutional Provisions Involved**

The constitutional provisions involved are the Fourteenth Amendment of the Constitution of the United States; Article 12th of the Bill of Rights of the Constitution of New Hampshire, Article V of Part II of the Constitution of New Hampshire and Article VI of Part II of the Constitution of New Hampshire.

The Fourteenth Amendment of the United States Constitution provides in Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 12 of the Bill of Rights of the New Hampshire Constitution provides:

> "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary, or an equivalent. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent."

Article 5 of Part II of the New Hampshire Constitution grants to the general court the power "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all inhabitants within, the said state; and upon all estates within the same."

Article 6, Part II of the Constitution of New Hampshire, provides:

> "The public charges of government, or any part thereof, may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order."

## D

### Question Presented

The question presented is whether the State of New Hampshire has the power to levy an inheritance tax against

legatees upon property which was not received by them from the estate of the deceased but which was paid by the executors of the estate to others in order to compromise a contest against the decedent's will.

E

**Reasons Relied On for the Allowance of the Writ**

I. *The New Hampshire Inheritance Tax Law as construed and applied by a majority of the New Hampshire Supreme Court is unconstitutional since it amounts to a taking of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.*

The New Hampshire Inheritance Tax is levied upon the interest of the legatee or distributee. It is a tax upon the right to succeed to property passing by will or inheritance. *Carter* v. *Craig*, 77 N. H. 200, 205 (90 A. 598); *Williams* v. *State*, 81 N. H. 341, 355 (125 A. 661); *Caskey* v. *State*, 93 N. H. 438, 442 (43 A(2) 768); *State* v. *Haley*, 94 N. H. 69, 73 (45 A(2) 533). It is not a tax upon the estate of the decedent and in this respect it is to be distinguished from the Federal Estate Tax.

An inheritance tax which is arbitrary, unreasonable and unequal is in violation of the Fourteenth Amendment of the United States Constitution. *Magoun* v. *Illinois Tr. & Sav. Bank*, 170 U. S. 283, 300; *Campbell* v. *California*, 200 U. S. 87; *Keeney* v. *New York*, 222 U. S. 524; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Binney* v. *Long*, 299 U. S. 280. In *Magoun* v. *Ill. Tr. & Sav. Bank, supra*, at p. 300, the Court said that the Fourteenth Amendment requires that the law imposing the tax "shall operate on all alike under the same circumstances." In *Binney* v. *Long, supra*, the Court

held that it was unconstitutional to single out for taxation, a class of remaindermen from all those similarly situated.

In the case at bar the residuary legatees are required to pay a tax on property which they did not receive and over which they never had any control. The residuary legatees did not participate in the settlement negotiations which resulted in the compromise agreement. The agreement was made by the executors alone. It was then found by the Probate Court to be reasonable and beneficial to the estate. The residuary legatees are not being taxed equally with other persons in the same class as themselves. They are required to pay a higher tax than other legatees receiving the same amount from the same size estate. There is no sound reason for this classification. They have been subjected to unfair discrimination. The taxing law as applied in this case by the Supreme Court of New Hampshire is arbitrary and unreasonable.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of New Hampshire, to the end that this cause may be reviewed and determined by this Court; that the order of the said Supreme Court of New Hampshire be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

STANLEY M. BURNS,
*Strafford Bank Building,*
*Dover, New Hampshire;*
*Attorney for Petitioners.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 883

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J. S. BUTNAM AND STANLEY M. BURNS, EXECUTORS OF THE ESTATE OF ABRAHAM BURTMAN,

*Petitioners,*

*vs.*

STATE OF NEW HAMPSHIRE

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

### Preliminary Statement

The statement of the matter involved, jurisdiction, the constitutional provisions involved, and the question presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

### Argument

*The New Hampshire Inheritance Tax Law as construed and applied by a majority of the New Hampshire Supreme Court is unconstitutional since it amounts to a*

*taking of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.*

The New Hampshire inheritance tax is a tax on the privilege of inheritance. It is a tax on the right to succeed to property passing by will or inheritance. *Carter* v. *Craig,* 77 N. H. 200, 205 (90A.598); *Williams* v. *State,* 81 N. H. 341, 355 (125 A. 661); *Caskey* v. *State,* 93 N. H. 438, 442 (43 A(2) 768); *State* v. *Haley,* 94 N. H. 69, 73 (45 A(2) 533). It is not a tax on the estate of the decedent. It becomes a lien on the legacy. R. L., c. 87, s. 52. The executor is required to deduct the tax from the legacy before paying it over to the legatee. R. L., c. 87, s. 54. The burden of the tax falls on the legatee or person entitled to succeed to the property.

In the case at bar the One Hundred Thousand Dollar ($100,000) compromise payment was made to the widow by the executors. It was a compromise settlement of her claim against the estate. This amount never came into the hands of the residuary legatees. It was paid out by the executors before the legatees acquired any right to it. The residuary legatees did not participate in the settlement negotiations and they had no control over the compromise made by the executors.

The will of Abraham Burtman authorized the executors to execute this compromise agreement. The will, which is an exhibit in the case, states in its last paragraph:

> "I further authorize, direct and empower said executors to compromise, adjust, or arbitrarte any matter and pay any debt upon such evidence as they deem sufficient and upon such terms and in such manner as to them, in their absolute discretion, may seem reasonable and advisable."

The will shows that it was the intent of the testator to leave the matter of adjustment of claims against the estate solely in the hands of the executors. By making the compromise settlement the executors were carrying out the testator's intent. By the terms of the will itself the legatees had no claim against any assets that the executors chose to use to pay out to compromise claims against the estate.

The compromise payment to the widow was made by the executors in accordance with the opinion of the New Hampshire Supreme Court in *Burtman* v. *Butman*, 94 N. H. 412, 54 A (2) 367. In that case the widow brought a bill in equity for specific performance of the compromise agreement. The petition was brought against the executors alone. Legatees under the will were not parties to the action. The Court held that the compromise agreement was valid and enforceable, if it was reasonable and beneficial to the estate. The Probate Court later found that the agreement was reasonable and beneficial to the estate. No requirement was made by that decision that the assent of the residuary legatees was necessary to the settlement. The case holds that the settlement was one which the executors had the power to make by themselves alone and which they were obligated to carry out.

At the death of the testator the title to his personal property passed to the executors. The legatees under the will had no title to it. Their right was only to share in the assets remaining in the hands of the executors after payment of the debts and expenses of administration. *Barrett* v. *Cady*, 78 N. H. 60, 64 (96 A. 325). The settlement to the widow was paid from the personal property left by the testator. Had the One Hundred Thousand Dollars ($100,000) been used to pay a debt of the testator, an inheritance tax could not have been charged on it. The

executors had authority under the will to use this property to pay any claim asserted against the estate. They exercised this authority over this property while it was in their hands and before the legatees acquired any right to it. It cannot be said that the residuary legatees ever succeeded to the One Hundred Thousand Dollars ($100,000) by will or by inheritance. It may also be pointed out that the One Hundred Thousand Dollar ($100,000) payment can be considered to be an expense of administration. In this view of the matter no inheritance tax could be assessed against it. R. L., c. 87, s. 37.

The Fourteenth Amendment to the United States Constitution prohibits an inheritance tax which is arbitrary, unreasonable and unequal. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 300; *Campbell* v. *California*, 200 U. S. 87; *Keeney* v. *New York*, 222 U. S. 524; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Binney* v. *Long*, 299 U. S. 280.

In the case of *Schlesinger* v. *Wisconsin*, 270 U. S. 230, the Court declared unconstitutional a Wisconsin statute which created a conclusive presumption that all gifts made within six years of death were made in contemplation of death. It was held that there was no adequate basis for creating this classification. It was there said at p. 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A. may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against B. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The United States Supreme Court in *Binney* v. *Long*, 299 U. S. 280, considered the validity of a provision of the Massachusetts Inheritance Tax Law. This provision taxed beneficiaries who took property at the death of a donee of a power of appointment. If the power of appointment had been created prior to 1907, the beneficiaries were taxed. If it had been created after 1907 they were not taxed. The Court held that there was no sound basis for distinguishing between the two cases and that the statute so applied was arbitrary and unreasonable. The Court stated at page 292:

> "In view of the hostile discrimination against a class of remaindermen arbitrarily singled out for taxation from all those similarly situated, we are bound to hold the statutes deny the equal protection of law in contravention of the Fourteenth Amendment."

This decision reversed a decision of the Massachusetts Supreme Judicial Court.

In *Coolidge* v. *Long*, 282 U. S. 582 the Court held it was unconstitutional to give an inheritance tax a retroactive effect so as to make it applicable to transfers completed before passage of the law.

In *Stebbins* v. *Riley*, 268 U. S. 137, it was decided that the taxing statute may create classifications provided that all persons subject to the legislation within the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. In *Keeney* v. *New York*, 222 U. S. 525, 536, it was said that there can be no arbitrary and unreasonable discrimination.

Discrimination by taxing authorities against a particular taxpayer cannot be upheld. A taxpayer taxed on the full value of his property while others are taxed only on partial value has justifiable cause for complaint. The

intentional systematic undervaluation by state officials of other property in the same class contravenes the constitutional rights of one taxed on the full value of his property. *Sioux City Bridge Co.* v. *Dakota County, Neb.*, 260 U. S. 441; *Cumberland Coal Co.* v. *Board of Revision, etc.*, 284 U. S. 23.

In the case at bar the residuary legatees have suffered an arbitrary and unreasonable discrimination. As Chief Justice Branch said in his dissenting opinion:

> "The injustice of the result reached in the majority opinion stands out clearly when it is noted that the residuary legatees are required to pay a legacy tax on the sum of $622,617.98, whereas they will receive from the estate only $522,617.98. Prior decisions of this Court clearly indicate that this cannot be done." In re Burtman's Estate, 63 A(2) 798, 800.

The residuary legatees have been taxed for property which they did not receive; over which they had no power of control; and in which they never acquired any right, title, or interest. The order of the New Hampshire Supreme Court results in taking property from them without due process of law and in violation of the equal protection of the laws. The tax levied on the $100,000 compromise payment made to the widow is unconstitutional as a violation of the Fourteenth Amendment.

## Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY M. BURNS,
*Strafford Bank Building,*
*Dover, New Hampshire.*